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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-192

BUFFALO CAB COMPANY, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT AND APPENDIX

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BUFFALO CAB COMPANY, INC., petitioner, petitions the United States Supreme Court for writ of certiorari, and respectfully shows to the Court the following facts:

REFERENCE TO REPORTS OF OPINIONS IN COURTS BELOW

The decision of the NATIONAL LABOR RELATIONS BOARD is reported at 189 NLRB No. 66. The decision of the United States Court of Appeals enforcing the order of the National Labor Relations Board is reported at 458 F.2d 499 (1972).

CONCISE STATEMENT OF GROUNDS ON WHICH JURISDICTION OF COURT IS INVOKED

i. The judgment of the United States Court of Appeals which petitioner seeks to have reviewed by this Court is dated April 20, 1972, and was entered on May 12, 1972.

ii. The petitioner's motion for rehearing was denied by the United States Court of Appeals on June 21, 1972.

iii. The statutory provision which petitioner believes confers on this Court jurisdiction to review the judgment in question by writ of certiorari is 29 U.S.C.A. § 160(e), which reads in pertinent part as follows:

> "The (NATIONAL LABOR RELATIONS) BOARD shall have power to petition any Court of Appeals of the United States . . . Upon the filing of the record with it the jurisdiction of the Court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by . . . the Supreme Court of the United States upon writ of certiorari or certification as provided in Section 1254 of Title 28."

Section 1254 of Title 28 of the United States Code provides in part as follows:

> "Cases in the Courts of Appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; . . . "

QUESTIONS PRESENTED FOR REVIEW

The questions petitioner seeks to have reviewed by this Court are:

1. Whether the owner-drivers of petitioner's taxicabs are independent contractors within the meaning of the NATIONAL LABOR RELATIONS ACT?

2. Whether the Court of Appeals can avoid reviewing the decision of the NATIONAL LABOR RELATIONS BOARD on the merits by characterizing the BOARD's decision as being a "legitimate credibility choice"?

STATUTES AND REGULATIONS INVOLVED

Title 29, Section 157, page 7999, United States Code, 1970 Edition:

"Employees shall have the right to self-organization, for form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 158(a)(3) of this title."

Title 29, Section 152(3), page 7996, United States Code, 1970 Edition:

> "The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or his spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined."

STATEMENT OF THE CASE

BUFFALO CAB CO., INC. is a Georgia Corporation having its office and place of business in Atlanta, Georgia. The relationship between the company and the owner-drivers of the BUFFALO taxicabs is seen from the following testimony of a company official, which testimony is in the Record beginning at page 166 of the appendix:

> "A. Well, when I talk to a man that wants to buy a car—it depends on the age of the car and what we think his ability to pay is.—I mean, if we know he's a good cab driver, we know he can pay. We take all these things into consideration and arrive at a down payment, and depending on the down payment and

the age of the car, we arrive at a weekly figure to pay for the car and when he agrees to it we tell him that the only thing we require is that he come in once a week and give us the turnin that he owes us, and that anything else that he does is just whatever the City Ordinance is, he will follow those instructions, or he should. We don't require that. We just tell him that he has to follow the City requirements or either they will, I guess write him up or make charges against him, or whatever. The only thing we require is that he come in once a week and make a payment to us and he can work where he wants to, any hours he wants to, and the only thing we require is that he come in and pay us once a week.

Q. Is there any obligation on his part to operate that automobile as a taxicab, as far as you're concerned?

A. No. We require that he comes in and pays us once a week. I don't care what he does with the car as long as he pays us once a week.

Q. All right. You mentioned something about his buying a car from you. It is possible for a man to have his own car, already paid for or maybe buying it from other source–

A. Yes.

Q. –And put it on your line?

A. Yes.

Q. Has this ever happened?

A. Quite often.

* * * * *

Q. When one of your owner-drivers needs tires on his automobile, who buys these tires?

A. He does.

Q. Does the cab company contribute any to the tires?

A. No.

Q. Do they contribute any to the service that we talked about earlier?

A. No.

Q. Maintenance of the automobiles?

A. None.

Q. The gas?

A. No.

Q. Oil?

A. I mean—just to put it simply, all maintenance, tires, gas, oil, everything involved in the car is paid for by the driver.

Q. All right. How about the license plate each year?

A. He pays for that.

Q. What about the inspection sticker that the State law requires?

A. He pays for that also.

HEARING OFFICER: Just a point of clarification, you said paid for by the driver.

THE WITNESS: By the car owner, whoever—

HEARING OFFICER: The owner of the car, whoever he might be?

THE WITNESS: Most cars are owned and driven by one person.

* * * * *

Q. What's the situation now when an automobile is involved in a wreck, does the driver-owner have to pay for his own damage?

A. Yes.

* * * * *

Q. When a cab driver gets a ticket for a traffic violation, does the cab company supply him with a lawyer to go down and–

A. No.

Q. –Have a hearing on this?

A. No, they do not.

Q. Does the cab company contribute any to his fines, if he's fined?

A. No.

Q. Again, if he's involved in an accident, who pays the wrecker fee for carrying this cab from the scene of the accident?

A. The driver. I mean the owner of the car, the car owner.

Q. Can you tell us whether or not the driver, the owner-driver uses his automobile for purposes other than a taxicab?

A. I know of quite a few cases where they do.

Q. Do you know whether or not they use them for their own personal use, generally?

A. Yes, they do say they do, and I know they do.

Q. Is there any requirements when an automobile is not being used as a taxicab it be parked on the BUFFALO BILL CAB COMPANY lot?

A. No. When they buy the car, it's, they know or we tell them that it's their car to keep twenty-four hours a day. They can drive if they want to.

* * * * *

Q. Counsel questioned you in the case hearing at some length concerning a customer making complaint against one of your drivers. Now, if you'll tell me, what is the customary procedure. A customer feels like he's been short changed and knows it was a BUFFALO BILL CAB and what does he do?

A. Well, this is something that I know happens, there's two things. One, they call the company, and as I said in the last hearing, the dispatcher takes the call. If they get too upset, the dispatcher will call me and let me talk to them. If the dispatcher can smooth it over they just, you know, smooth it over the best they can. Well, it's just—when somebody calls in they're hot and mad and screaming and yelling, you just try to calm them down the best you can. If the dispatcher can't do it they call me and I just try to smooth things over the best I can. Then another thing is they call the permit office.

Q. Where is that?

A. At the Atlanta Police Station. Now the reason I know they call them is because the permit office will call me and tell me there's been a complaint against the driver, would I please send him down to see them. And I always try to contact the driver and tell him to go to the permit office because they've got a complaint on it.

Q. Does the permit office ever take any disciplinary action against the cab company in these cases?

A. Not the cab company, they do against the driver.

Q. Does the permit office ever instruct the cab company to take disciplinary action against a driver?

A. They tell us—I can think of one example that they told us to do something, but they just said tell him to give you his permit or come to see us, for three days. I don't want him driving for three days, we're going to punish him by not letting him drive for three days. And either tell him to give you his permit or send him down to see us. Now that's just one occasion I can remember.

Q. What about any other occasions?

A. That's the only time I can remember the Police Permit Office telling me to do something to a driver. But in this case they just said either you get it or send him to us one. So I sent him down to them.

Q. Do any of the drivers ever get into any trouble by violating the rules out at the airport?

A. Yes, they do.

Q. What happens in one of these instances?

A. The airport sends two letters, one to us and one to the driver, explaining what the violation was and what his punishment is. And something in there says he's got a right to a hearing, to, I guess waive the punishment, or whatever it is, and he takes care of it himself. I don't know how it goes, how it happens. I just know he takes care of it himself.

Q. Is this letter sent by the airport police?

A. The airport police makes the report. I don't really know who sends it.

Q. Whoever this is that sends you the letter, do they ever take any disciplinary action against BUFFALO BILL CAB COMPANY?

A. Not the cab company, just the driver.

Q. Do they sometimes bar the offending driver from the airport for a number of days?

A. Yes.

Q. Do they ever bar all BUFFALO BILL cabs?

A. No, just the driver that's involved.

Q. With respect to the dispatch service that's operated by the cab company, will you tell us whether or not all cab drivers, all owner-drivers check in with the dispatch office and check out when they knock off a day's work?

A. Some of them do and some of them don't.

Q. Is there any company rule or policy with respect to checking on and off?

A. No.

Q. Does BUFFALO BILL CAB COMPANY encourage or discourage or are they just indifferent as to whether they check on and off?

A. Well, if they call us and tell us they're coming out to work, we'll write it down. If they don't call us and don't tell us, we don't write it down. So I suppose it would be just indifferent. We don't require it, don't care one way or the other. It's just for their convenience. If they want people to know they're working, they check on. If they don't want to let them know they're working, they don't check on.

Q. Why would an owner-driver want someone to know whether or not he was working?

A. If he gets special call, he'd want somebody to know he was working so they could get in touch with him and give him his special calls.

Q. When the dispatcher takes a telephone call and someone in the public wants a taxicab, I assume this dispatcher announces the call over the air, is that correct?

A. Right.

Q. Does he have any idea where any owner-driver has his cab at that particular moment?

A. Never knows where the cabs are unless they tell him.

Q. He keeps no map or strategic plot?

A. If they just happen to tell her where they are and she remembers it, then she'd know. Otherwise there is no way she'd know.

Q. How extensively does she put this call out?

A. Well, she'll pick a street that's close, a cross street that's close, to the call, to the address that's called in, and she'll ask if there is a cab at that location. If nobody answers then she'll ask if there is a cab that will go to that location and if nobody answers then she just forgets about it until the people call back again.

Q. Is there any way she can coerce or require an owner-driver to answer a call?

A. She can beg and plead, that's what she usually does, please, somebody help me. And that's it.

Q. Now what if someone answers the call and says, yes, I'm near this intersection. Is this person then obligated to take that call?

A. No, they take it if they want it, if they don't want it, they refuse it.

Q. Is there any company policy that will get this person in any kind of hot water for refusing to take a call?

A. No, there's nothing we can do to them, they either take it or they don't take it.

* * * * *

Q. Have you seen taxicabs in the City having advertising space sold or advertising some product on the taxicab in some manner?

A. Yes.

Q. Are there any BUFFALO BILL cabs with advertising space leased out or rented out or sold?

A. No, there isn't.

Q. Could you give us any reason why there aren't?

* * * * *

A. We feel—we've thought about it before, that we might get some extra income, but we figure we just don't have the right . . . We don't have any right to tell the drivers to put advertising on their car. We don't have any right.

* * * * *

Q. Mr. Cody, during political campaigns, when the company might want to support one candidate or the other, is the company able to outfit these BUFFALO BILL taxicabs with political signs?

A. It's the same thing. We can't tell the drivers what to do with their car. I mean, as far as advertising or political campaigns are concerned, we can't tell them what to do with them.

* * * * *

Q. I believe you testified earlier that the company has no way of withholding income, income tax or social security tax.

A. No.

Q. Now, would you tell us the service that you offer to withhold self-employment tax, how many owner-drivers avail themselves of this service?

A. Well, for this last year, it's not the same seventeen but the maximum has been seventeen and the minimum, I'd say, was about ten, of the drivers that asked us to hold self-employment tax. Somewhere between ten and seventeen.

Q. Does the company contribute at all to this self-employment tax?

A. No, we just hold the money for them until the end of the year.

Q. Then what's done with it?

A. We made a check payable to the Internal Revenue and the individual owner. And he does what he want to with it. I mean, it's supposed to be used for his self-employment tax, but I don't know how he uses it." (A-166-183).

"Q. There's testimony about two different dues arrangements, seventy-four dollars and fifty-one dollars, is that right?

A. Seventy-five and fifty-one.

* * * * *

Q. I believe you testified that seventy-five was imposed in two different instances. One, where an owner-driver would hire someone else to drive his cab when he wasn't driving it?

A. Basically, two drivers is what we're talking about.

Q. And I believe you testified there are no two-driver arrangements at present?

A. . . . I take that back, one car with two drivers and this is a 1966 car that was bought by the driver now, in '66, and we made arrangements with two drivers to drive the car. . . . But right now that's the only case.

Q. The only two-driver case?

A. Any other car that wants to put on two drivers, seventy-five dollars." (A-193).

An unfair labor practice charge was filed by Charlie Jones, an owner-driver of a BUFFALO taxicab, alleging that BUFFALO CAB CO., INC. had discharged him for engaging in protected concerted activity. At the hearing before the Trial Examiner BUFFALO CAB CO., INC. asserted that the owner-drivers, such as Charlie Jones, were not covered by the National Labor Relations Act

because they were independent contractors and not employees. The evidence set forth above was presented to substantiate this contention. The NATIONAL LABOR RELATIONS BOARD, in a decision reported at 189 NLRB No. 66 concluded that the owner-drivers were not independent contractors, and found that Charlie Jones was not discharged for cause, but for engaging in protected activity. The United States Court of Appeals for the Fifth Circuit enforced the NATIONAL LABOR RELATIONS BOARD'S order of reinstatement and back pay, and it is this judgment which BUFFALO CAB CO., INC. seeks to have reviewed by the Supreme Court on writ of certiorari.

ARGUMENT

The Supreme Court's writ of certiorari is sought in this case on the grounds that the United States Court of Appeals for the Fifth Circuit has rendered a decision in conflict with the decision of another Court of Appeals on the same matter.

It is clear from the evidence cited above that the company has not reserved control over the owner-drivers. The one obligation the owner-driver has to the company is to come in once a week and make his weekly payment. There is not one single thing an owner-driver owes the company other than this. If there are other rules and regulations the owner-driver must comply with it is because of City ordinances or State laws, and if this is construed as control it is control by the City or the State, but certainly not control by the cab company.

The term "control" is defined as "The right to control and direct the work, not only as to the result to be accomplished by the work, but also as to the manner and

means by which that result is accomplished". *N.L.R.B. v. Steinberg*, 182 F.2d 850, 857 (C.A. 5, 1950). In the instant case the owner-drivers have the right to operate their vehicles wherever it pleases them to do so. They have the right to refuse trips put out by the dispatcher. They have the right to not operate their vehicles as taxicabs at all, so long as they come up with their weekly payments.

The "result to be accomplished by the work" of the owner-driver is taxicab service. The "manner and means by which that result is accomplished" is when and where the taxicab service is rendered. Not only has the company no right to dictate the "where" and the "when", it has no right to dictate that taxicab service be performed at all.

In the *Steinberg* case cited above the Court resorted to the legislative history of the Taft-Hartly Act in arriving at its distinction between employees and independent contractors:

> "An 'employee', according to all standard dictionaries, according to the law as the Courts have stated it, and according to the understanding of almost everyone, with the exception of members of the NATIONAL LABOR RELATIONS BOARD, means someone who works for another for hire . . . It must be presumed that when Congress passed the Labor Act, it intended words it used to have the meanings that they had when Congress passed the Act, not new meanings that, nine years later, the LABOR BOARD might think up. In the law, there always has been a difference, and a big difference, between 'employees' and 'independent contractors'. 'Employees' work for wages or salaries under direct supervision. 'Independent contractors' undertake to do a job for a price, decide how the work will be done, usually hire others to do the work, and

depend for their income not upon wages, but upon the difference between what they pay for goods, materials, and labor and what they receive for the end result. That is, upon profits. It is inconceivable that Congress, when it passed the Act, authorized the BOARD to give to every word in the Act whatever meaning it wished. On the contrary, Congress intended then, and it intends now, that the BOARD give to words not far-fetched meanings but ordinary meanings." *Steinberg*, above, p. 854, note 11.

The BUFFALO owner-driver receives no wages or salaries from the company. He buys his automobile, he rents the top light and meter, he buys his own oil, gas, service, pays for his own repairs, hires another driver if he wishes to do so, and the money he "earns" is the difference between the total of the sums he has expended for these things, and the sum of the fares he collects from his passengers.

In the case of *N.L.R.B. v. A.S. Abell Company*, 327 F.2d 1 (C.A.4, 1964), the Court of Appeals was called upon to determine whether certain rural and motor newspaper route carriers were "employees" or "independent contractors". In reviewing the evidence in that case the Court found that the carriers in question delivered newspapers within certain defined geographical areas. The carriers were operating under contracts, one of which allowed the company to terminate upon the carriers failure to render satisfactory service or to meet his financial obligations, or by either party upon ten days notice. The other contract allowed the company to terminate without notice. The Court found that the essential business decisions concerning the operation of his route were largely within the discretion of the carrier, and that he would either reap the profits or bear the losses

which were the consequences of his judgments. The carrier determined the number of papers he received, and bore the loss if he ordered too many. He also bore the loss if the papers were damaged, lost, or destroyed. He chose whether to operate the route himself or hire others. His profit was the difference between the amount he paid for the papers and the sum he collected from his customers. His actual delivery of newspapers was largely uninhibited by publisher control, or supervision. His contacts with the publisher were quite limited. He determined in large measure the time he would devote to his job, there being no fixed time at which he was required to begin or end his work day. The carriers paid self-employment tax, and the company made no deduction for social security or income taxes. No Workmen's Compensation insurance was carried by the company.

After enumerating the above evidence, the *Abell* Court held, at page 9 of the opinion:

> ". . . Concededly there are certain circumstances, such as the relatively permanent nature of the relationship and the manner in which it may be terminated, which are more characteristic of the employment relationship than of independent contractor status. However, it is the total situation and not any single factor which must determine the status of these carriers. Upon consideration of the whole record, in view of the risks undertaken, the opportunity for profit and the very significant amount of control retained by the carriers over the manner and means by which their routes are operated, we cannot conclude that the evidence indicative of employment is substantial.

* * * * *

> For the reasons above stated, we conclude upon considerations of the record as a whole that the BOARD'S decision is not supported by substantial evidence. The petition for enforcement of the BOARD'S order is therefore denied."

We submit that the similarities between the relationship of owner-driver and BUFFALO CAB COMPANY on the one hand, and the newspaper carriers and Abell Co. on the other, are striking. Just as was the case with the carriers, the owner-drivers perform their jobs free of supervision and control by the company, and they reap the profits or losses of their own business judgements, namely when and where to offer their taxi services.

In arriving at the decision that BUFFALO owner-drivers are employees rather than independent contractors, the Trial Examiner seized upon the fact that the company is required by the Atlanta ordinances to assume responsibility of an owner-driver's tort action, and must sponsor an applicant for a permit to drive a taxi before the Police Department will issue such permit. These facts, it concludes, give the company effective control of the manner and means by which the result is to be accomplished by the owner-drivers. This conclusion by the BOARD is a gross misinterpretation of the correct definition of the term "manner and means" as used by the Courts. In the case of *Taylor v. Local No. 7, Inter. U. of Journeymen Horseshoers*, 353 F.2d 593 (C.A. 1., 1965) p. 598, note 2, the Court stated:

> "The distinction between the end result and the ways and means of accomplishment may well be demonstrated by the following: Many men prefer the same barber, returning time after time and at more or less regular intervals, even though the barber may change shops. Some barbers make

appointments while others do not. Some are union members while others are not. A customer learns from experience that a certain barber can serve him acceptably and according to instructions. It may be that the customer wants clipper used on the sides of the head and on the back of the neck; another wants his hair trimmed only with scissors; another wants a 'crew cut'; one wears his hair long and another short; some want their eyebrows trimmed while others do not. The customer always assumes the right to direct the barber during the course of the hair-cutting operation—to take off here and there or leave portions untouched. The barber provides the tools and equipment and fixes his fees. The customer in each instance is interested in the end result even though directing certain ways and means of accomplishment. The barber strives to please in order to assure the customer's return. Obviously the amount of retained control and right to direct does not convert the status of the barber from independent contractor to that of employee."

We submit that the City regulated permit, which does in fact have to be signed by the cab company, and the sales arrangement agreed to between the company and the owner-driver have nothing whatever to do with the manner and means whereby the rendering of taxicab service is accomplished. The company is "interested in the end result", insofar as the successful accomplishment of that result, namely rendering taxicab service, will provide the owner-driver with funds sufficient to make his weekly payment to the company.

The glaring error which we submit was committed by the Court of Appeals was in refusing to review the BOARD'S decision that the owner-drivers are employees, on the grounds that such finding by the BOARD

represented a "credibility choice" which the Court's scope of review would not permit to be disturbed. Granted the decision that Charlie Jones was terminated for engaging in protected activity was a credibility choice. There was conflicting evidence on that point and the BOARD chose to believe the General Counsel's evidence.

But the evidence was not conflicting on the issue of the relationship between the company and the owner -drivers. On this issue each side introduced evidence concerning the relationship factors it deemed to be pertinent to the issue, virtually all of which evidence was uncontradicted by the other side. The LABOR BOARD made a conclusion of law on the issue of the employment relationship, not a credibility choice. And we are entitled to have that conclusion of law reviewed by the Court of Appeals. (*Universal Camera Corp. v. Labor Board*, 340 U.S. 474, p. 490).

CONCLUSION

For the reasons set forth above, petitioner submits that the Court of Appeals erred in its decision to enforce the order of the NATIONAL LABOR RELATIONS BOARD. We respectfully urge the Court to review the Court of Appeals' decision by writ of certiorari.

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APPENDIX

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

BUFFALO CAB CO., INC.
and
CHARLIE JONES, AN INDIVIDUAL

Case 10–CA–8229

DECISION AND ORDER

On November 19, 1970, Trial Examiner Bernard J. Seff issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, Respondent filed exceptions to the Trial Examiner's Decision and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions and briefs, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Trial Examiner and hereby orders that the Respondent, Buffalo Cab Co., Inc., Atlanta, Georgia, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's recommended Order.

Dated, Washington, D.C. March 29, 1971

John H. Fanning, Member
Gerald A. Brown, Member
Howard Jenkins, Jr., Member
NATIONAL LABOR RELATIONS BOARD

(SEAL)

[Caption omitted in printing]

ERRATUM

Delete the first three lines on the top of page 10 since this information set forth that the General Counsel alleged the violation of 8(a)(3) of the Act. This is in error.

/s/ Bernard J. Seff
Trial Examiner

Dated: November 25, 1970

[Caption omitted in printing]

TRIAL EXAMINER'S DECISION

STATEMENT OF THE CASE

BERNARD J. SEFF, Trial Examiner: Upon a charge of unfair labor practices filed by Charlie Jones, an individual, on March 13, 1970,[1] against Buffalo Cab Co., Inc., herein called Respondent or Employer, the General Counsel of the National Labor Relations Board issued a Complaint and Notice of Hearing on July 10 in which it is alleged that Respondent had engaged in unfair labor practices in violation of Section 8(a)(1) and (3) of the National Labor Relations Act, as amended, herein called the Act. Respondent's answer admitted certain allegations of the complaint but denied the commission of any unfair labor practices. At the hearing which took place before me in Atlanta, Georgia, on August 26, Respondent raised certain issues with respect to jurisdiction which will be dealt with *infra* in this decision. All parties were present at the hearing and subsequent to the hearing Respondent and General Counsel filed briefs which have been carefully considered.

Subsequent to the close of the hearing the General Counsel filed a motion to correct the record. The motion is hereby granted.

Upon the entire record in the case and from my observation of the demeanor of the witnesses, I make the following:

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[1] All dates are in 1970 unless otherwise indicated.

FINDINGS OF FACT

I.

RESPONDENT'S BUSINESS

Respondent and Buffalo Holding Co., Inc., are, and have been at all times material herein, Georgia corporations, with their principal office and place of business located at Atlanta, Georgia, where they are engaged in rendering taxicab services.

Respondent and Buffalo Holding Co., Inc., are, and have been at all times material herein, integrated businesses constituting a single business enterprise with common ownership, common management, and common control of labor relations.

Respondent stated on the record that it had no records from which its actual volume of business and the income earned by the drivers employed by the Company could be ascertained. It stated that it did not do a gross volume of business in excess of $500,000 but it did admit that during the same period it purchased and received goods valued in excess of $5,000 directly from suppliers located outside the State of Georgia. In July and August 1969, Buffalo Cab Co., Inc., Buffalo Holding Co., Inc., Buckley's Garage and Service, and Jesse Buckley were involved in a representation case, captioned 10–RC–7838, in the course of which there was adduced on the record considerable economic data. The Board never issued a decision with respect to the representation case because the Union withdrew its petition before a decision could be rendered. The records with respect to the representation case were incorporated by reference into the instant proceeding.

The joint Employers herein are the Buffalo Cab Co., Inc., hereinafter termed BCC, and the Buffalo Holding

Co., Inc., hereinafter termed BHC or the Holding Company. The BCC operates taxicabs in the city of Atlanta. In order to provide public transportation the BCC has joined with the BHC. The BHC has as its "business activity: leasing and rentals" and its "product or service: taxi cabs." Buckley's Garage and Service, hereinafter termed BGS, supplies gas, oil, and repair work for the vehicles operating in the Employers' system.

All of the above Employers occupy the same physical premises. The stockholders of the BCC and the BHC are identical and their proportionate ownership in each of the corporations is also identical. They have the same attorney and the same accountant. The BHC owns title to approximately 80 of the 95-100 vehicles operating in the system. In the course of conducting its business and in order to keep taxicabs on the streets and provide transportation the Holding Company borrows money from various banks and then the said Company buys taxicabs. The Holding Company leases the taxicabs to BCC for $100 per month and the BCC searches out "buyers." The BCC then receives a down payment from the prospective "buyer" and continues to accept note payments often up to 3 years. At the time of the hearing BCC was paying and continues to pay the Holding Company approximately $8,000 per month in order to lease vehicles which it in turn is "selling" to drivers. Of the vehicles operating in the system nine are owned outright by single owners; three are owned by one Hinson; and two are owned by Jesse Buckley, the operator of Buckley's Garage and Service.

Buffalo Holding Company owns the land from which the taxicab system operates. The BCC pays rent to the Holding Company, BGS also pays rent to the Holding Company. During the 1969 fiscal year Buckley paid rent

to the BCC. However, since the same person owns both corporations, the person to whom the rent is paid is of no legal significance.

In order to operate its system the BCC has a radio dispatch operation. The BCC has a license to operate the dispatch radio from the Federal Communications Commission and the radio sending equipment and antennae are owned by the BHC and are rented from them by the BCC. The dispatchers who operate the radio are employees of the BCC.

Even though a very small number of the taxis are owned by individuals the "oneness" of the total operation is evidenced by the following: All cabs are identical in appearance; they are painted white, and the name Buffalo Bill Cody is painted on the side and they have the head of a buffalo on the roof; all taxis are required to have telephone number "873-6242" prominently displayed on the side and top of every cab; the same telephone number appears in the telephone book and on business cards; the printing of the cards and the payment of the telephone bills are all paid for by the BCC.

The ultimate fact that Respondent operates a unified system is borne out by the following characteristics: The joint Employers turn in envelopes for drivers and have charge account customers; central bookkeeping facilities to effectively operate charge accounts; business cards; liability insurance up to $100,000; accident investigation; clerical aids to facilitate accident investigation; settlement and adjustment facilities; attorneys for court actions; both Georgia and Federal tax collection facilities; central bookkeeping for tax purposes for drivers; the obligation to obtain vehicle registration; integrated and functional financing of taxicabs for drivers over an extended period

of time at convenient terms; sale of gas, oil, and minor repairs through BGS; a credit system available only to drivers in "Buffalo Cab System" for major repair and taxicab maintenance; exclusive stands; representation through rate hearings to gain increased cab rates; centralized dispatch service; a significant abundance of business through the dispatching system; functional and effective work rules; effective advertisement and a holding out to the public of a unified and integrated taxicab system by the mandatory distinctive paintings and decorations placed upon the vehicles. Two-way radio, meter, and top light are maintained free of charge.

Respondent in its brief raises the issue that Buffalo drivers are independent contractors within the meaning of the Act. In determining whether an individual is an independent contractor or an employee, the Act requires the application of the "right of control" test. Where the person for whom the services are performed retains the right to control the manner and means by which the result is being accomplished, the relationship is that of employment. In the instant case, the 8(a)(1), Charlie Jones was admittedly discharged by the Respondent. In Atlanta a single cab owner-driver may not independently drive a cab. The city ordinances of the city of Atlanta reflect an intention to provide for the protection of the public through the requirement of centralized supervision and control in the operating company. For example, without the company sponsorship a driver cannot obtain his driver's permit. The company occupies the legal relation of principal and agent with respect to liability to the public and assumes responsibility for the driver's tort actions. Further amplification of the fact that the Employers recognized that they operate as a "city license cab company" is found in the fact that the Respondent

provides liability insurance, investigates accidents, provides attorneys' services for defense of lawsuits, satisfies claims without contribution by drivers, and handles customers' complaints. In the case at bar the Respondent effectively controls the manner and means by which the result is to be accomplished by its drivers and this relationship is one of employment. In the instant case Jones was discharged by Respondent. On the basis of the facts in the record I find that the drivers are not independent contractors but are employees of the Respondent.

II.

THE EMPLOYER[2] IS ENGAGED IN INTERSTATE COMMERCE

It is not disputed that the Employer purchases supplies directly from outside the State of Georgia of an amount greater than $5,000 annually. The Employer in this case denies that there is a combined gross of over $500,000 and it reaches this conclusion because it contends that the income of the drivers should not be considered as part of the Employer's income.

The record shows that the Employer stated it was unable to produce information relative to the income of the drivers who have been found to be its employees. The Employer stated on the record both in the instant case and in the R case adverted to *supra* that it had no record of nor any way of knowing the amounts of drivers' fare receipts. In the previous representation case transcript there is information to indicate that the average fare receipts ran from approximately $235 to $250 a week.

[2] Employer or Respondent hereinafter refers to the Buffalo Cab Co., Inc. (BCC).

Jones testified that the average weekly gross ran around $300. The General Counsel made a projection based on the above information about fare receipts on the following basis: He took the lowest possible figure of $235 as representing average weekly receipts and multiplied this by the lowest average of 50 vehicles (allowing for breakdowns) times 50 weeks (allowing for vacations, time off for breakdowns) and thus obtained an annual gross of $587,500 from taxicab receipts alone. These figures were all collated from the R case transcript and are based on the last fiscal year of the Employer where the average number of vehicles "on the line" was 53. In August 1970 the Employer admittedly operated between 98 and 100 vehicles minus 12 to 13 cabs down a week because of wrecks and breakdowns. If 53 vehicles generate gross receipts of $587,500, 85 vehicles may well be expected to gross over a million dollars in fiscal 1970. Thus based on both last year's figures and this year's from taxicab receipts alone, this Employer is well within the Board's jurisdictional standards for the taxicab industry. The Board has consistently found it appropriate for jurisdictional purposes to combine the gross revenues of the Employer and the owner-drivers.[3] Respondent contended that a gross of $163,662 shown on the record for the fiscal year 1968-1969 is a figure which represents total receipts and includes all dues and car payments remitted to the Employer by all drivers. However, it is to be noted that this figure does not include any of the drivers' gross fare receipts. Nor does the figure of $146,942, which represents total moneys received by Buffalo Cab Co. and Buffalo Holding Co., include any of the fare receipts of the drivers, or the income accruing to the Employer of 1 cent per gallon on gasoline sold by BGS.

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[3] *Miami Beach Yellow Cab*, 173 NLRB No. 116.

From all of the above information I find that the Respondent grosses in excess of $500,000 per year and its drivers, except for those who themselves hire drivers (only a very small number of owner-drivers), are all employees of the Employer and are not independent contractors.

III.

THE UNFAIR LABOR PRACTICES INVOLVED

The Discharge of Charlie Jones

Jones began to drive for the Respondent on September 10, 1969, and he was discharged on March 12, 1970. The Employer in the instant case defended against the allegation of discriminatory discharge by stating (a) that he did not know that Jones was involved in concerted activity and (b) that he was discharged for cause in that he was chronically behind in the payments which he was required to make and in fact had accumulated a debt owed to the Company at the time of his discharge of approximately $800. Respondent's knowledge of Jones' concerted activities appears in the record which shows the following:

> Well, me and Andy and Little John was sitting and talking about the stand dues was too high, and the car payments was too high. So we agreed among us, ourselves, to talk to the drivers. We all agreed among ourselves to talk with the drivers and see if we couldn't have a meeting with Mr. French about the car notes and the lick. [Lick is the colloquial term used to explain the amount of money owed by the drivers as a result of their arrangement to purchase their taxicabs by paying dues, and a weekly payment which was made towards the purchase of the cab.]

We appointed Little John for the speaker, and he was going to be the speaker that Saturday morning at 11:00 o'clock.

According to the Company's records Jones was discharged on Thursday, March 12. The meeting referred to, above, by Jones in his testimony relates to a group meeting among the employees which was scheduled to take place on the following Saturday. According to the calendar this meeting was therefore scheduled to take place on March 14.

The testimony of Jones continues as follows:

That was on a Wednesday. The date I don't remember. That was on a Wednesday. And so they said, let's pass around among the drivers and let them know we are going to have a meeting at 11:00 o'clock, and for everybody to be there.

* * * * *

We didn't say right then that we were going to have a strike. We were supposed to put the cars on the yard at 11:00 o'clock.

If we didn't come to some kind of agreement with Mr. French, we would leave all the cars on the yard until we come to some kind of agreement.

* * * * *

I was in [located in] Underground Atlanta on the cab stand. I was parked under there and I seen Thelmore (Supervisor Thelmore Cowell) . . . .

Q. Who is Thelmore?

A. They say he is a wreck investigator for the Company, and also the supervisor. Anyway, I went back to the car and was talking to him, and I said, you heard anything about the meeting we are supposed to have Saturday? And he said, no, sir, I

haven't heard anything about it. I said, we are supposed to have a meeting Saturday. And I said, they says everybody is to be there and put their cars on the yard. And so he told me, you had better not be there; go on and go to work.

So I said, I am going to do what the rest of them do, because I want to be a part of it.

* * * * *

I was in the bull-pen and the operator called me on the radio and said, Mr. French wants to see you. Come over to the office.

I was down in the bull-pen, and I got out of my cab. I come down went out in the airport and got on the telephone and called Mr. French. I asked Mr. French, I said, Mr. French, do you want me, and he said, yes. I want to see you.

I said about what. And he said, I paid Thelmore at Underground Atlanta last night.

He said, I want to see you about something else. Be over there at 5:00 o'clock. So when I got out of the bull-pen, I got over there at a quarter of 5.

Jones testified that he parked his car on the gas pump and got out and went in the office. Cowell was in the office with James William Cody, Jr., secretary-treasurer of the Company, and those present were joined by Mr. Arthur French, president of the Company.

The record continues:

So he said, Mr. French says to me, he said, tell me about this meeting ya'll are supposed to have with me Saturday. And I said, Mr. French, the only thing I know is that we got out there and we discussed that we wanted to talk to you about something. That is all I know.

From this testimony it is clear that Cowell was told by Jones that the men had decided to hold a meeting on Saturday, March 14. The record also shows that during Jones' conversation he told Cowell that he and other employees at a meeting earlier in the day had agreed to park all of their cabs together in Respondent's yard on Saturday and meet with Respondent's president, French, about lowering the dues and cab payments. It is also clear that Cowell understood the purpose of this meeting and this is manifested by the fact that he openly voiced his opposition to the proposed meeting which Charlie Jones was going to attend and further stated, "You'd better not be there; go on and go to work." Jones then replied, "I'm going to do what the rest of them do, because I want to be a part of it."

It is especially significant to point out that the testimony given by Jones was direct and unrebutted. Furthermore, it is significant that Respondent, who contends that it had no knowledge of Jones' concerted activities, did not produce Cowell, a supervisor, through whom this knowledge was attained, as a witness to contradict the testimony given by Jones. Therefore the Company had knowledge of the concerted activities being planned by the men and the fact that Jones intended to participate in this activity. Furthermore the record shows that Jones owed the Company only $42 for the week of March 2, 1970, and he submitted the money, in accordance with normal procedure, to Cowell on the night of Wednesday, March 11, 1970.

The General Counsel points out in his brief that the conversations and remarks attributed to the president, French, could not have been rebutted by him in person at the time the hearing took place because French was sick and unable to be present. However, no request was made

to adjourn the hearing until French recovered. General Counsel's brief goes on to say, "it must be presumed, therefore, that had such testimony or evidence been offered by Respondent, it would have most certainly been adverse to Respondent's contention." *Missouri Transit Company*, 116 NLRB 587, 588, enfd. 250 F.2d 261 (C.A. 8). Concerning such a state of facts the Supreme Court in *Interstate Circuit, Inc. v. The United States*, 306 U.S. 208, 226, stated:

> The production of weak evidence when strong is available can lead only to the conclusion that the strong would have been adverse. . . . Silence then becomes evidence of the most convincing character.

The record further shows that on cross-examination Cody admitted that on March 12, or possibly March 11, it had come to his and Mr. French's attention that there had been some type of meeting of the drivers and that a formal strike might occur. In further elucidation of the Company's knowledge Cody further admits that the wrecking supervisor, Cowell, had been the source of his and French's information that the employees had held the meeting and had planned a possible strike. Cody's testimony on cross-examination further reveals that French interrogated Charlie Jones because he was trying to find out about the meeting the drivers had held and who the strike leaders were.

Respondent's counsel stated on the record that the reason why Jones was discharged "or the reason we took his car away from his is because he was behind some eight hundred and some odd dollars and this $260 that we advanced him just to get his automobile out of the shop. It was supposed to be repaid in installments and we never saw any of it." "The business about the guys getting together and saying we are going to put the cars on the lot had nothing to do with this."

The record shows that Respondent had no clear policy to show that when a driver fell behind on his payments this default, if continued for a certain length of time, would result in the discharge of such driver and the repossession of his cab. If the Company had any such policy the record is devoid of any evidence to show such a company practice. It would also seem unlikely that as a matter of good business any employer would permit a driver in this type of setup to fall more than $800 behind in his payments. In any event, if it was an established company policy to discharge an employee for failure to make regular payments on account of his purchase of the cab he was driving, such a practice was not testified to nor was it stated that default in payments would result in discharge.

CONCLUDED FINDINGS

It is clear from the record that Respondent is engaged in commerce within the meaning of the Act and does in fact have a gross income in excess of $500,000 a year taking into consideration both its expenditures in order to run the business and the gross income received by its drivers from operating their cabs. It is further clear that Jones was not an independent contractor and he was in fact discharged by Respondent. The timing of the discharge requires a most careful evaluation. Note that Jones was discharged on Thursday, March 12. This was the middle of the week. Note also that on the day before his discharge Jones told the company supervisor that there was going to be a meeting on Saturday at which the men were going to make certain demands on French having to do with the reduction of dues and the payments applied against the purchase of the cabs. On

the very next day after this information was made known to the Employer, Jones received a telephone call to report to the office. When he reached the office the company president, French, queried him about the meeting that was scheduled to take place on Saturday, the 14th of March. French also interrogated Jones as to who the leader of this movement among its employees happened to be and upon receiving a vague answer from Jones immediately discharged him. All of this takes place against a very weak and uncertain explanation of the basis for the discharge as given by Respondent. Absent a clearly defined policy which is made known to and understood by the men that their failure to make payments .on a regular basis would result in their discharge, it would appear that the explanation of this policy is an afterthought.

Under all these circumstances I find that Jones was discharged for engaging in concerted activities and the reason given by the Company to explain the discharge was a pretext. Having found this fact, the conclusion follows that the Company, by discharging Jones under the circumstances set forth, *supra*, violated Section 8(a)(1) of the Act.

Inasmuch as no different remedy or order would be required, I find it unnecessary to consider whether Respondent's conduct also violated Section 8(a)(3) of the Act as alleged in the complaint.

IV.

THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of the Respondent set forth in section II, above, occurring in connection with the Respondent's operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V.

THE REMEDY

It having been found that the Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) of the Act, it will be recommended that Respondent cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

I have heretofore found that Respondent discharged Charlie Jones on March 12, ostensibly because he fell behind in his payments on the purchase of his taxicab. I have also found that the reason offered by the Respondent to explain the discharge is a pretext. In fact Jones was discharged because of his concerted activities. Accordingly, I shall therefore recommend that Respondent offer Charlie Jones immediate and full reinstatement to this former job or, if that job no longer exists, to a substantially equivalent position and make him whole for any loss of pay he may have suffered by reason of the discrimination practiced against him by payment to him of a sum equal to that which he normally would have earned from the date of his discharge to the date of his

reinstatement less his net earnings during said period. The backpay provided for herein shall be computed in accordance with the Board's formula set forth in *F.W. Woolworth Co.*, 90 NLRB 289, with interest thereon at the rate of 6 percent per annum computed in the manner prescribed in *Isis Plumbing & Heating Co.*, 138 NLRB 716.

Upon the basis of the above findings of fact and the entire record in this case, I make the following:

CONCLUSIONS OF LAW

1. Buffalo Cab Co., Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. By interrogating Jones and warning him to go on back to work and not to go to a meeting scheduled among the employees to discuss a change in their working conditions, Respondent has engaged in, and is engaging in, unfair labor practices affecting commerce within the meaning of Section 8(a)(1).

3. By discharging Jones under the circumstances set forth, *supra*, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1).

4. By interfering with, restraining, and coercing employees in the exercise of their rights guaranteed in Section 7 of the Act, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[4]

Respondent, Buffalo Cab Co., Inc., Atlanta, Georgia, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging Respondent's employees from engaging in concerted activities by discharging employees or in any other manner discriminating in regard to their hire or tenure of employment or any term or condition of employment.

(b) Interrogating employees and, as in the case of Jones, warning him not to go to a meeting at which working conditions of the employees were scheduled to be discussed.

(c) In any other manner interfering with, restraining, or coercing employees in the exercise of their right to self-organization, to form labor organizations, to join or assist fellow employees, or any labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities.

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[4]In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, recommendations, and Recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and order, and all objections thereto shall be deemed waived for all purposes.

2. Take the following affirmative action which I find is necessary to effectuate the policies of the Act.

(a) Offer to Charlie Jones immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position.

(b) Make Charlie Jones whole for any loss of pay he may have suffered as a result of the discrimination practiced against him in the manner set forth in the section of this Decision entitled "The Remedy."

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Recommended Order.

(d) Post at its offices in Atlanta, Georgia, copies of the attached notice marked "Appendix."[5] Copies of said notice, on forms provided by the Regional Director for Region 10, after being duly signed by Respondent's representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

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[5]In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

(e) Notify the Regional Director for Region 10, in writing, within 20 days from the receipt of this Decision, what steps have been taken to comply herewith.[6]

Dated at Washington, D.C.

APPENDIX

NOTICE TO EMPLOYESS

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT interrogate our employees in an attempt to discourage them from engaging in concerted activities.

WE WILL NOT discharge any of our employees or in any other manner discriminate against our employees in regard to their hire or tenure of employment or any term or condition of employment.

WE WILL offer to Charlie Jones immediate and full reinstatement to his former job or, if that position no longer exists, to a substantially equivalent position.

WE WILL pay Charlie Jones for any loss of wages he suffered as a result of our discrimination against him.

---

[6]In the event that this Recommended Order is adopted by the Board, this provision shall be modified to read: "Notify said Regional Director, in writing, within 10 days from the date of this Order, what steps Respondent has taken to comply herewith."

All our employees are free to engage in concerted activities concerning their wages, hours of employment, or any other conditions of employment. The employees are also free to refrain from engaging in such activity.

BUFFALO CAB CO., INC.
(Employer) ,

Dated _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Peachtree Building, Room 701, 730 Peachtree Street, N.E., Atlanta, Georgia 30308, Telephone 404–526-5760.

Before GEWIN, AINSWORTH and SIMPSON,
Circuit Judges.

PER CURIAM: The National Labor Relations Board petitions the Court for enforcement of its order[1] against Buffalo Cab Company (the Cab Company) of Atlanta, Georgia, which adopted the decision of one of its Trial Examiners, finding the Cab Company guilty of unfair labor practices under Section 8(a)(1) of the Act in connection with the discharge of one of its drivers, and requiring the Cab Company to take the following action to effectuate the policies of the Act: (a) offer the driver full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position; (b) make the driver whole for any loss of pay suffered as a result of the discrimination; (c) to preserve and upon request to make available to the Board for examination the Company records necessary to analyze the amount of back pay due under the order; (d) post appropriate notices; and (e) notify the Regional Director of the steps taken to comply therewith within twenty days from the decision.

The Cab Company's contest of the right to enforce the NLRB order centers around the question of whether its drivers are employees or "independent contractors", the question whether it is engaged in interstate commerce, as well as a dispute whether the driver was discharged for engaging in concerted activities, as found by the Trial Examiner, rather than for the ground asserted by the Company, that the owner-driver was behind in his payments for his cab. The decisions by the Trial Examiner adopted by the Board, that the driver was

[1] The Board's decision and order are reported at 189 NLRB No. 66 (March 29, 1971).

discharged for engaging in concerted activities and that the reason given by the Cab Company to explain the discharge was a pretext, that the Cab Company was engaged in interstate commerce, and his further decision that the owner-driver was not an independent contractor, each represent credibility choices supported by substantial evidence. Our scope of review does not permit us to disturb these legitimate credibility choices.

The decision and order of the National Labor Relations Board is

ENFORCED.

JUDGMENT

Before: GEWIN, AINSWORTH and SIMPSON, Circuit Judges.

THIS CAUSE was submitted to this Court upon the application of the National Labor Relations Board for the enforcement of a certain order issued by it against Respondent, Buffalo Cab Co., Inc., its officers, agents, successors, and assigns on March 29, 1971. The Court, having carefully considered the transcript of record filed in this cause, and being fully advised in the premises, and having determined the case appropriate for summary disposition without oral argument, on April 20, 1972, handed down its decision granting enforcement of the Board's Order.

ON CONSIDERATION WHEREOF, it is hereby ordered and adjudged by the United States Court of Appeals for the Fifth Circuit that the said Order of the National Labor Relations Board in said proceeding be

enforced and that Respondent, Buffalo Cab Co., Inc., its officers, agents, successors, and assigns, abide by and perform the directions of the Board in said Order contained.

ENTERED: MAY 12, 1972

[Certificate of Service Omitted in Printing]

[Caption Omitted in Printing]

[Filed June 21, 1972]

ON PETITION FOR REHEARING

Before GEWIN, AINSWORTH and SIMPSON, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

United States Court of Appeals
FIFTH CIRCUIT
OFFICE OF THE CLERK

EDWARD W. WADSWORTH
CLERK

ROOM 408-400 ROYAL ST.
NEW ORLEANS, LA. 70130

July 5, 1972

Mr. Michael J. Reilly
Attorney at Law
1510 First Federal Bldg.
40 Marietta St., N.W.
Atlanta, Ga. 30303

No. 71-2901 – National Labor Relations Board v.
Buffalo Cab Co., Inc.
(Your No. 10-CA-8229)

MANDATE STAYED TO: August 4, 1972

Dear Sir:

The court has this day granted a stay of the issuance of the mandate to the date as shown above. If during the period of the stay there is filed with the clerk of this court a notice from the clerk of the Supreme Court that the party who has obtained the stay has filed a petition for the writ in that court, the stay shall continue until final disposition by the Supreme Court. Upon the filing of a copy of an order of the Supreme Court denying the petition for writ of certiorari the mandate shall issue immediately under Rule 41, FRAP.

Under revised Rule 21(1) of the Supreme Court effective July 1, 1970, a record is no longer required in connection

with an application for writ of certiorari, and therefore will not be routinely prepared by this office (38LW 3502).

Enclosed is a copy of the opinion, judgment and order denying rehearing which are still required by the Supreme Court to be incorporated as an appendix to your petition.

Very truly yours,

EDWARD W. WADSWORTH, Clerk

By /s/ Susan Le Brun
Deputy Clerk

enc.

cc (LETTER ONLY)
Mr. Marcel Mallet-Prevost
Mr. Walter C. Phillips

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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-192

BUFFALO CAB COMPANY, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 23a-24a) is reported at 458 F. 2d 499. The Board's decision and order (Pet. App. 1a-22a) are reported at 189 NLRB No. 66.

JURISDICTION

The judgment of the court of appeals was entered on May 12, 1972, and a timely petition for rehearing was denied on June 21, 1972 (Pet. App. 24a-25a).

The petition for a writ of certiorari was filed on August 3, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Board properly concluded that the company's taxicab owner-drivers are employees rather than independent contractors.

STATUTE INVOLVED

In addition to the provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), set forth at Pet. 3-4, Section 8(a)(1) is also relevant. It provides:

> It shall be an unfair labor practice for an employer—
>
> > (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

STATEMENT

A. The Board's Findings of Fact

Petitioner, Buffalo Cab Company, Inc. (the "Company"), and its affiliated corporation, Buffalo Holding Co., Inc. (the "Holding Company"), provide taxicab transportation in Atlanta, Georgia (Pet. App. 4a; A. 95, 101).[1] The cabs are operated by "owner-

[1] "A." refers to the Appendix to the briefs in the court below.

drivers," who are hired as follows: The Company agrees to "sell" a cab to a prospective "owner-driver" (Pet. App. 5a; A. 116-117). Oral financing arrangements are made, with the owner-driver making a downpayment[2] tailored to his circumstances and determined, in part, by whether the Company believes him to be "a good cab driver" (A. 164-166). The driver also agrees to make weekly car and dues payments, which are unilaterally set by the Company, for the use and maintenance of the cab and the right to operate within the Buffalo Cab system (Pet. App. 5a, 6a-7a; A. 117-118, 165-166, 144, 201).

The car payments are spread over as much as a three-year period with no financing charges, and the payments are suspended when the cab is in the shop for repairs or the owner-driver is ill (Pet. App. 5a; A. 63, 191, 206, 219, 270). Moreover, if an owner-driver fails to make weekly car and dues payments, his car becomes subject to repossession and "resale" by the Company without regard to any equity he may have in it (A. 270, 20, 45, 180-181).[3] The Holding Company, which originally purchased the cabs, retains title to them, takes depreciation deduc-

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[2] If a driver cannot afford a "downpayment," the Company may still hire him to operate a cab, in which case he will be treated exactly like the owner-drivers who are "buying" their cabs (A. 172-173).

[3] Very few drivers have been able to complete the payments. Of the approximately 95 vehicles operating in the Buffalo Cab system at the time of the Board hearing, only nine were owned outright by single owner-drivers and five were so owned by persons with more than one cab (Pet. App. 5a; A. 119-120).

tions for them on its income tax returns, and registers them (Pet. App. 5a, 6a; A. 114, 143-144, 257).

The Company requires the owner-driver to fill out an application for the permit that is required to operate a taxicab in Atlanta (Pet. App. 7a; A. 131-132, 243, 244). An Atlanta ordinance provides that "no permit shall be granted to any person or corporation for the operation of taxicabs within the City of Atlanta unless such person or corporation has a minimum of ten taxicabs operating under its supervision and control at the time of consideration of its application" (Pet. App. 7a; A. 265). By its sponsorship of the owner-driver, the Company also certifies "that the applicant is to work with this company as a driver and so far as tort liability is concerned, we will occupy legal relation of principal and agent and will assume responsibility for his actions as an agent provided by law of Georgia as relates to principal and agent" (Pet. App. 7a-8a; A. 243).

The Company requires all taxicabs operating within the Buffalo Cab system to be identical in appearance. They are all painted white, and the name "Buffalo Bill Cody" is painted on their sides. The Company's telephone number must be prominently displayed on the sides and roof of each cab. The top light on each cab bears the words "Buffalo Bill Cab," along with a replica of a buffalo head (Pet. App. 6a; A. 122-123, 240).

All Buffalo Cabs are equipped with two-way radios, which are owned by the Holding Company and leased to the Company. The Company's dispatch system

provides a large portion of the business available to the owner-drivers (Pet. App. 7a; A. 178). When someone calls the Company requesting a taxi, the Company dispatcher notifies the owner-drivers on duty and, under the Company's rule, the answering driver nearest the caller's location has the option to pick up the caller (Pet. App. 6a, 7a; A. 128-129). All drivers are supposed to be on duty six days a week, every week, in order to meet payments to the Company (Pet. App. 7a; A. 63).

The Company also bargains for and maintains exclusive cab stands for Buffalo Cabs at profitable locations in Atlanta (Pet. App. 7a; A. 196-197, 207). Drivers working these stands are required by Company rule to let the first cab at the stand take the first fare (Pet. App. 7a; A. 197). Further, the Company maintains charge accounts for some of its customers, and the owner-drivers are furnished clerical aids for use in facilitating credit transactions with these customers (Pet. App. 6a; A. 125-127, 129, 241). Charge accounts are also maintained for airlines flying into Atlanta (Pet. App. 6a; A. 129). All charge accounts are processed through the Company's centralized bookkeeping system (Pet. App. 6a; A. 126).

The Company provides owner-drivers with business cards with which to solicit business (Pet. App. 6a; A. 123-124, 241). These cards bear the Company's name and telephone number, together with the Company slogan and a drawing of a buffalo head. The Company's name and telephone number also appear

in the Atlanta telephone directory; the Company receives and handles calls for taxi service, as well as customer complaints, at this number (Pet. App. 6a; A. 123, 128).

In conjunction with the owners of Atlanta's other licensed cab companies and without the participation of the owner-drivers, the Company has obtained cab fare rate increases from the city (Pet. App. 7a; A. 198-200). The Company also submits sales taxes on the taxi fares to the state and receives a rebate on the taxes for timely submission (Pet. App. 6a; A. 138-140). The Company provides federal income tax collection and bookkeeping facilities for the owner-drivers to pay "self-employment taxes," and it annually draws a check for the payment of taxes for owner-drivers making use of these facilities (Pet. App. 6a; A. 140, 183).

Under the Atlanta ordinance requiring licensed city cab companies to assume liability for the negligence of their owner-drivers, the Company posts a bond with the city (Pet. App. 6a, 7a-8a; A. 266, 157, 133). The Company is a self-insurer for up to $15,000 of liability; beyond that, it purchases insurance that covers liability up to $100,000 (Pet. App. 6a, 7a-8a; A. 132-133). When an accident involving a Buffalo Cab occurs, the Company sends an investigator to the scene of the accident, who fills out the Company's accident report form and attempts to settle any claims (Pet. App. 6a, 7a-8a; A. 134-136). If he cannot settle a claim, the officers of the Company make an attempt at settlement (Pet. App. 6a,

7a-8a; A. 136). If suit is brought, the Company provides attorneys for the court action (Pet. App. 6a, 7a-8a; A. 136-137). Any claim which the Company ultimately satisfies is without contribution by the owner-driver involved in the accident; the Company also absorbs the loss of the taxicab if it is demolished, and owner-drivers are not required to obtain collision insurance to protect the Company's "security interest" in the cab (Pet. App. 6a, 7a-8a; A. 136, 202-203).

In operating the cabs, the owner-drivers obtain gas, oil, and minor repair work from Buckley's Garage and Service, a company located on premises owned by the Holding Company and shared with the Company (Pet. App. 5a, 7a; A. 146-147, 235, 238). When a Buffalo Cab is in need of major repairs, the Company will provide an owner-driver with an interest-free loan to cover the cost of repair (Pet. App. 7a; A. 194-195). When repairs are needed on the taximeter, the two-way radio, or the top light, the Company itself provides these repairs without charge to the owner-drivers (Pet. App. 7a; A. 137, 145-146, 181).

B. The Decisions Below

Based on the foregoing facts, the Board found that the Company's owner-drivers were "employees" within the meaning of Section 2(3) of the Act,[4]

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[4] Section 2(3) provides that the term "employee" shall not include "any individual having the status of an independent contractor."

rather than independent contractors, and that therefore they were entitled to collective bargaining rights under Section 7 of the Act (Pet. App. 7a-8a). The Board further found that the Company had violated Section 8(a)(1) of the Act by threatening and coercively interrogating owner-driver Charlie Jones and by discharging him for engaging in protected concerted activity (Pet. App. 18a-19a). The court of appeals sustained the Board's findings and conclusions, and enforced its order (Pet. App. 23a-24a).

ARGUMENT

In *National Labor Relations Board* v. *United Insurance Co.*, 390 U.S. 254, 256, the Court held that "general agency principles" are to be used in distinguishing between employees and independent contractors under the Act. The Court acknowledged that "[t]here are innumerable situations where it is difficult to say whether a particular individual is an employee or an independent contractor" and that in such cases "there is no shorthand formula or magic phrase that can be applied to find the answer, but all of the incidents of the relationship must be assessed and weighed with no one factor being decisive." (390 U.S. at 258).[5]

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[5] The cases cited by petitioner, involving different facts and types of employment, are therefore inapposite. As the court of appeals held in *National Labor Relations Board* v. *A.S. Abell Company*, 327 F. 2d 1 (C.A. 4), cited by petitioner (Pet. 16), "precedent is of limited value in the resolution of this question" (327 F. 2d at 10).

The Court also held that the Board's determination of this issue should "not be set aside just because a court would, as an original matter, decide the case the other way" (390 U.S. 260):

> As we said in *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, "Nor does it [the requirement for canvassing the whole record] mean that even as to matters not requiring expertise a court may displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*." 340 U.S., at 488. Here the least that can be said for the Board's decision is that it made a choice between two fairly conflicting views, and under these circumstances the Court of Appeals should have enforced the Board's order. It was error to refuse to do so.

The court of appeals here properly declined to disturb the Board's finding that an employer-employee relationship existed between petitioner and its drivers. The evidence established that the drivers "do business in the company's name with considerable assistance and guidance from the company and its managerial personnel"—one of the "decisive" factors in *United Insurance Co.*, *supra*, 390 U.S. at 259. Moreover, the Company treats its drivers as "employees" in obtaining permits for them to operate the cabs, assumes tort responsibility for the drivers as employees, and its sister corporation (Buffalo Holding Co.) retains title to the cabs, takes depreciation deductions for them on its income tax returns and registers them.

On these and the other facts enumerated above, the Board properly concluded that petitioner's drivers were employees, rather than independent contractors, within the meaning of the Act. Under the standard of judicial review announced in *United Insurance* the court of appeals correctly upheld that finding.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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